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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. ~~7270.~~ 70-5426

DOROTHY ELLIOTT,
Petitioner,

vs.

DOLLAR GENERAL CORPORATION,
JOE V. WILLIAMS, JR.,
Individually and as Trustee, and
ROBERT SCHOLZE WILLIAMS,
Individually and as Trustee,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR RESPONDENTS JOE V. WILLIAMS, JR. AND ROBERT SCHOLZE WILLIAMS, INDIVIDUALLY AND AS TRUSTEES, IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 7279.

DOROTHY ELLIOTT,

Petitioner,

vs.

DOLLAR GENERAL CORPORATION,
JOE V. WILLIAMS, JR.,
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ROBERT SCHOLZE WILLIAMS,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

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OPINIONS BELOW.

The opinion of the Supreme Court of Tennessee has not, as yet, been published in the official reporter system but appears in the appendix of the Petition in this Court (Appendix 2). The opinion of the Supreme Court of Tennessee on Petition to Rehear is also in said Appendix (Appendix 12). Final Decree of the trial court is not a published opinion and appears in the Appendix to the Petition in this Court (Appendix 18).

JURISDICTION.

These respondents do not question the jurisdiction of the Court to entertain this matter.

CONSTITUTIONAL AMENDMENTS INVOLVED.

1. Amendment VII to the Constitution of the United States:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law."

2. Amendment XIV Section 1 of the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

Question 1. Did the action of the courts of the State of Tennessee in sustaining the demurrers of the defendants deny the plaintiff a right to trial by jury in a civil case as guaranteed by the Seventh Amendment to the United States Constitution?

Respondents contend that the answer is NO.

Question 2. Did the action of the courts of the State of Tennessee in sustaining the defendants' demurrer abridge the Equal Protection, Privileges and Immunities or Due Process Clauses of the Fourteenth Amendment to the United States Constitution?

Respondents contend the answer is NO.

STATEMENT.

Respondents accept the petitioner's statement of the case.

ARGUMENT.

A basic administrative question is whether this Court could even function if it had to consider and dispose of the constitutional questions asserted to exist by the petition filed herein. If even a minor percentage of plaintiffs rebuffed by demurrers, motions to dismiss or motions for summary judgment felt they were entitled to review by this Court, the flood of petitions would literally inundate the premises.

I.

Question 1. Did the action of the courts of the State of Tennessee in sustaining the demurrers of the defendants deny the plaintiff a right to trial by jury in a civil case as guaranteed by the Seventh Amendment to the United States Constitution?

Both the trial court and the Supreme Court of the State of Tennessee have reviewed the propriety of the action of the trial court in sustaining the demurrers filed on behalf of the defendants. They have both concluded that the action was in all respects proper and that, because the plaintiff was guilty of negligence as a matter of law, she had no cause of action against the defendants which would entitle her to proceed further.

The purpose of a demurrer in Tennessee procedure, as in other jurisdictions, is to test the legal sufficiency of the cause of action asserted by the plaintiff. For the purposes of a ruling upon a demurrer the truth of the facts plead is admitted. *Kelley v. Longmire,* 435 S.W.2d 818, 222 Tenn. 307 (1968); *Johnson v. City of Greenville,* 435 S.W.2d 476, 222 Tenn. 260 (1968). However, the demurrer does not admit as true legal conclusions, deductions or inferences drawn by the plaintiff, nor does it admit any but obvious inferences from the facts plead. *Kelley v. Longmire, supra, Provident Life & Accident Ins. Co. v. Professional Cleaning Service, Inc.,* 396 S.W.2d 351, 217 Tenn. 199 (1965); *Dunnebacke v. Williams,* 381 S.W.2d 909, 214 Tenn. 581 (1964). In other words a demurrer admits all facts well-plead by the declaration but contends that such facts do not constitute a cause of action as a matter of law. *Henderson v. Lawrence,* 369 S.W.2d 553, 212 Tenn. 247 (1963). By the very nature of a demurrer, as with the federal procedure of a motion to dismiss, all

factual issues are put aside, leaving only a question of law to be decided.

In Tennessee the parties have a right to have all issues of fact tried by a jury. *Morgan v. Tennessee Central Railway Co.*, 216 S.W.2d 32, 31 T.A. 409 (1948). The rule of law in Tennessee has developed over the entire history of the state that in a case in which there is no dispute as to the facts, the judge, without the intervention of a jury, applies the law to the facts and renders judgment thereon. *Sevier v. The Justices of Washington County*, 7 Tenn. 334 (1824). Another early case establishes the constitutional propriety of the demurrer. *Hopkins vs. Railroad*, 96 Tenn. 409 (1896). In this case the Supreme Court of Tennessee states that the defendant may demur to the plaintiff's evidence and obtain the judgment of the trial judge, as upon a directed verdict, whether as a matter of law any recovery can be had, or liability fixed against him upon the undisputed facts, and this is not a violation of the constitutional guaranty of a trial by jury.

Therefore, since it is the function of the jury to decide disputed issues of fact, and upon a demurrer all facts are admitted, the decision is left to the trial judge whose duty is to determine whether the declaration states a cause of action as a matter of law. Facts admitted by the defendant do not form issues which should be submitted to the jury for determination. *Wilson v. Maury County Board of Education*, 302 S.W.2d 502, 42 T.A. 315 (1957). Since the jury at common law had the province of determining all issues of fact and rendering a general verdict upon proper charge as to the law, it follows that in the absence of an issue of fact the necessity of a jury determination is no longer present. All that remains is an application of law to the facts and this is the province of the

trial judge. *Harbison v. Briggs Brothers,* 354 S.W.2d 464, 209 Tenn. 534 (1962). That Court goes further in the dissent by Justice Burnett and discusses the right of trial by jury at common law and in light of decisions of the Supreme Court of the United States as follows:

> "What is a 'jury trial' under our Constitution, the United States Constitution, and most constitutions, has been well said by Mr. Justice Gray in *Capital Traction Co. v. Hof,* 174 U.S. 1, 13, 43 L. Ed. 873, 19 S. Ct. 580, 583, 585:
>
> > ' "Trial by jury," in the primary and usual sense of the term at common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by jury of 12 men in the presence and under the superintendence of a jury empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion: Yet there are unequivocal statements of it to be found in the books.'
>
> The substance of this doctrine has been recognized by the appellate courts of this State for over a century. A particularly apt commentary thereon and an excellent statement was made a hundred years ago by Judge McKinney in *Whirley v. Whiteman,* 38 Tenn. 610, at page 616. In that opinion this Court at that time, a hundred years ago, expressed recognition of the practice of requiring a special verdict upon facts in order that the court may make an application of law. The Court likewise recognized

> then when it appears that there is no conflict in the evidence the facts are all admitted, and it would not be submitted to a jury. If the Court may apply the law upon a special verdict settling controverted facts, why may not the court make application of law upon facts which are undisputed, that are all admitted by the evidence?"

The question of the Seventh Amendment's guarantee of a trial by jury normally arises in those situations in which a procedure has been established for the remedy of wrongs and that procedure does not provide for trial by jury. That is not the situation with which we are faced in the instant case, however, the reasoning of the courts in those situations, which present an even stronger "denial of trial by jury" than the present situation, is useful in showing the scope of the Seventh Amendment to the United States Constitution and the rights and powers of the individual states in this area.

The question before this Court is not whether the facts of the case presented a proper situation for sustaining demurrers to the declaration (although a review of the record would certainly show it to be such) but rather is whether such action taken in a proper case is violative of the Seventh Amendment to the United States Constitution and also the Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment.

The courts of the United States have held that by its language, the Seventh Amendment to the United States Constitution is not applicable to the states: *Walker v. Sauvinet*, 92 U.S. 90 (1876), *infra*. In summarizing the rule which has developed over an extended period of time, the United States Federal District Court of Iowa in *Gustavson v. Peck*, 216 F. Supp. 370 (1963), states as follows:

> "As to the alleged denial of the right to a jury trial, the Seventh Amendment does not operate to guarantee a jury trial in the state court but applies only to courts of the United States. 5 Moore, p. 77. *Minneapolis & St. Louis Railroad Co. v. Bombolis,* (1916) 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961, Ann. Cases 1916 E., 505, L.R.A. 1917 A., 86; Dennis, Jury Trial and the Federal Constitution, (1906) 6 Col. L. Rev. 423; Scott, Fundamentals of Procedure in Actions of Law, (1922) 72 . . . ."

The more recent case of *Iacaponi v. New Amsterdam Cas. Co.*, 258 F. Supp. 880, aff'd at 379 F.2d 311, cert. denied 88 S. Ct. 802, 389 U.S. 1054 (1966), involves a statutory system of workmen's compensation which did not allow for trial by jury in actions for personal injury sustained in work-related activities. The plaintiff in the case alleged a denial of due process of law as guaranteed by the Fourteenth Amendment and alleged a denial of trial by jury as guaranteed by the Seventh Amendment. The Court in that case stated the rule very succinctly as follows:

> "A litigant in a state court civil action has no constitutional right to a trial by jury under the Seventh Amendment or under the Due Process Clause of the Fourteenth Amendment. A state may establish its own procedures and practices with regard to the conduct of civil litigation including the right to trial by jury. *Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.*, 284 U.S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931)."

Thus, it is clearly seen that the case law involving the Seventh Amendment holds uniformly that the Seventh Amendment does not apply to cases in state courts. In this regard, the wording of the Amendment itself is pertinent. By its wording, the Amendment applies only

to courts of the United States. This has been interpreted to mean courts established under the authority of the United States and not courts whose source of power is the individual state. See Amendment VII, *supra*, and *Walker v. Sauvinet*, 92 U.S. 90 (1876) *infra*.

The argument is raised that the Seventh Amendment is made applicable to the states through the Fourteenth Amendment. However, the case of *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968), states the scope of the application of the Bill of Rights through the Fourteenth Amendment. The Seventh Amendment is conspicuously absent and by its language should remain so. See Amendment VII, *supra*. The Supreme Court of the United States speaking in the *Duncan* case points the scope of the Fourteenth Amendment to be as follows:

> "The Fourteenth Amendment denies the states the power to 'deprive any person of life, liberty, or property, without due process of law.' In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That Clause now protects the right to compensation for property taken by the state; the rights of speech, press and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free from compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy, public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses."

The test set forth in the *Duncan* case as to whether a portion of the Bill of Rights will be applied to the state is (1) whether the right guaranteed is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions; (2) whether the right guaranteed is basic to our system of jurisprudence; and (3) whether the right guaranteed is a fundamental right, essential to a fair trial. It is submitted that none of these tests are met by the right guaranteed in the Seventh Amendment so as to make it applicable to the states.

It should be noted that the federal courts have a similar system whereby cases are disposed of prior to trial. This mechanism is that of the summary judgment or motion to dismiss and has the same effect of denying a trial by jury when as a matter of law the plaintiff does not have a cause of action. In this regard the case of *Page v. Work*, 290 F.2d 323, cert. denied 82 S. Ct. 121, 368 U.S. 875, 7 L. Ed. 2d 76 (1961), states:

> "If the district court correctly concluded that the appellees were entitled to a summary judgment, appellant cannot complain of the deprivation of a jury trial. *Fidelity and Deposit Co. of Maryland v. United States*, 1902, 187 U.S. 315, 23 S. Ct. 120, 47 L. Ed. 194; *Lindsey v. Leavy*, 9 Cir., 1945, 149 F.2d 899." The Court further cites Moore's Federal Practice, Vol. 6, §56.06, 13.

Further, by sustaining the demurrers, the trial court was exercising a function similar to that of a federal trial court in sustaining a motion to dismiss or motion for summary judgment. This is the function of deciding in which cases there are issues of fact which will require a determination by a jury and which cases present only matters of law which do not require a jury determination, and

which are within the sole power of the trial judge. Matters of law are to be determined by the court. In the instant case, the trial court and the Supreme Court of Tennessee have decided that the plaintiff was guilty of contributory negligence such as to bar a recovery as a matter of law. Having properly exercised this discretion, there is no issue for the jury to determine.

It is submitted, therefore, that the action of the state court was not in violation of any right guaranteed under the Seventh Amendment to the United States Constitution. It is further submitted that the action of the state court was in conformity with the prescribed action for federal courts and that since such action on the part of the federal court would not be violative of any right under the Seventh Amendment, it can hardly be said that the state court action is violative of the Amendment.

II.

Question 2. Did the action of the courts of the State of Tennessee in sustaining the defendants' demurrer abridge the Equal Protection, Privileges and Immunities or Due Process Clauses of the Fourteenth Amendment to the United States Constitution?

Many of the same considerations apply to the second question involving violation of the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment and the Court is referred to the previous citations for authority in this area. The case law in this area is also determinative of the issues involved. The case of *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931), is a case involving a question of forced arbitration of disputes brought about by a statutory substitu-

tion of arbitration for trial by jury. This statutory system was attacked on the basis of the Fourteenth Amendment's Equal Protection and Due Process Clauses, and the Court stated:

> "... it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure."

The case of *Walker v. Sauvinet* (1876), 92 U.S. 90, 23 L. Ed. 678, is a case which discusses the very basis of the Seventh Amendment and Fourteenth Amendment questions involved in our situation. Although the case is old, the reasoning is still valid and has not been changed. The Court states as follows:

> "All questions arising under the Constitution of the state alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By Article 7 of the Amendments, it is provided, that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott,* 21 Wall. 557. The states, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process or law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be jury. This requirement of the Constitution is met if the trial is had accord-

ing to the settled course of judicial proceedings. *Murrays Lessee v. Hoboken L & I Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the Constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States. Article 6 Constitution. Here the state court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States."

Again, the case of *Duncan v. State of Louisiana, supra,* states the applicability of the Bill of Rights through the Fourteenth Amendment.

The recent case of *Boddie v. Connecticut,* ___ U.S. ___, 91 S. Ct. 780 (1971), discusses the requirements of due process in civil litigation. In discussing the right of a party to a hearing, the Court says:

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor, supra,* 93 U.S. at 278, 23 L. Ed. 914, or who, without justifiable excuse violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 351, 29 S. Ct. 370, 380, 53 L. Ed. 530 (1909). What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner; *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965) (Emphasis added),' for [a] hearing appropriate to the nature of the case, *Mullane*

v. Central Hanover Bank & Trust Co., supra, 339 U.S., at p. 313, 70 S. Ct., at p. 657 . . . ."

The procedure followed in the instant case was exactly as described there. The trial court granted at a meaningful time a hearing appropriate to the nature of the case. The courts of Tennessee have determined that there were no issues to be submitted to the jury and hence no claim or issue which required determination other than is proper for the judge to make as a matter of law.

CONCLUSION.

On the basis of the case law, Constitutional language and the foregoing arguments the respondents, Joe V. Williams, Jr. and Robert Scholze Williams, Individually and as Trustee, respectfully submit to this Court that the trial court and the Supreme Court of Tennessee have properly exercised the powers granted to them, and peculiarly within their power, to apply the law to an undisputed set of facts and render judgment thereon. Respondents further submit that the action of the Tennessee courts was neither a violation of the guaranty of the Seventh Amendment of the Constitution of the United States, nor a violation of the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

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